Nos. 87-363 and 87-364

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Petitioners,

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION OF WILLIAMS NATURAL GAS COMPANY FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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January 14, 1988

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MOTION OF WILLIAMS NATURAL GAS COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 36.3 of this Court's rules, Williams Natural Gas Company (WNG) hereby moves for leave to file the attached brief as *amicus curiae* in support of the petitioners urging reversal of *Martin Exploration Management Co.* v. *FERC*, 813 F.2d 1059 (10th Cir. 1987). The necessity for this motion arises because WNG was unable to obtain the written consent of all parties to participate fully in this case as *amicus curiae*. WNG did, however, receive written consent to participate fully as *amicus curiae* from many of the key parties, including

the Federal Energy Regulatory Commission, all of the other petitioners, Shell Offshore, Inc. and Shell Western E & P Inc., and Martin Exploration Management Co.[1]

1. As explained more fully in the enclosed brief, WNG, which owns and operates a major interstate natural gas pipeline system, possesses a clear and direct interest in this case. In particular, WNG purchases natural gas under 1100 contracts for resale to direct industrial customers and gas distribution companies. The cost of a substantial portion of that gas will be directly affected by the outcome of this proceeding. WNG estimates that the Tenth Circuit's decision, if upheld, may cause WNG, its customers and ultimate consumers over $100 million in additional costs for past purchases and over $50 million in additional purchased gas costs for each future year. The magnitude of these amounts are such that WNG and its customers may face greater harm as a result of the Tenth Circuit's decision than any other interstate natural gas pipeline company.

2. Further, WNG's interest in this proceeding has been previously recognized by both the Tenth Circuit and this Court. The Tenth Circuit, for example, granted WNG's motion for leave to submit a brief as *amicus curiae* in support of the requests for rehearing of its March 9, 1987 decision in this case. By letter dated November 30, 1987, this Court similarly granted WNG's motion for leave to submit a brief as *amicus curiae* in No. 87-363 in support of the petitions for a writ of certiorari. Given this significant interest, WNG submits that it is necessary that it be allowed to submit the attached brief. Indeed, acceptance of this brief will help assure that the Court is fully apprised of all aspects of the issues in this case, particularly since WNG's arguments may differ in some respects from the arguments that will be raised by other parties.

[1] These written consent forms were submitted to the Court on September 21, 1987.

WHEREFORE, WNG respectfully requests the Court to grant this motion and to accept and consider its attached brief as *amicus curiae* in support of the petitioners in this case.

Respectfully submitted,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR WILLIAMS NATURAL GAS COMPANY AS AMICUS CURIAE

Pursuant to Rule 36 of this Court's rules, Williams Natural Gas Company (WNG) submits its brief as *amicus curiae* in support of the petitioners in Nos. 87-363 and 87-364. In this brief, WNG will demonstrate that the Tenth Circuit committed clear legal errors in reversing the Federal Energy Regulatory Commission's (Commission) interpretation of Title I of the Natural Gas Policy Act (NGPA).[1]

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[1] The Tenth Circuit's decision in Martin Exploration Management Co. v. FERC, 813 F.2d 1059 (1987) is set forth in the Ap-

INTEREST OF WILLIAMS NATURAL GAS COMPANY

WNG possesses a clear and direct interest in this case. WNG owns and operates a major interstate natural gas pipeline system under various certificates of public convenience and necessity issued by the Federal Power Commission (FPC) or its successor, the Commission. WNG purchases gas under approximately 1100 gas purchase contracts and then transports and resells this gas primarily in Kansas and Missouri to distribution companies or to industrial customers served directly from its system. The distribution companies, in turn, resell this gas to approximately 2,900,000 ultimate consumers.

WNG purchases substantial amounts of gas dually qualified under both deregulated (*e.g.*, NGPA §§ 102(c) and 103(c))[2] and regulated (*e.g.*, NGPA § 107(c)(5))[3] NGPA categories. Under Order No. 406, WNG was able to reduce the price of much of its dually qualified gas to measurably lower market oriented prices. The Tenth Circuit's reversal of Order No. 406, however, if upheld, will result in substantially higher prices for dually qualified gas. WNG estimates that such higher prices may cause WNG, its customers and the ultimate consumers increased costs totalling over $100 million for past purchases and over $50 million in additional purchased gas costs for each future year.

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pendix at 1a-33a. The Commission's rulemaking orders (Order Nos. 406 and 406-A), which are before this Court, are set forth in the Appendix at 61a-131a.

[2] 15 U.S.C. § 3312(c), covering "new" natural gas from new reservoirs, certain new OCS leases, or new wells drilled a certain distance from existing "marker" wells. 15 U.S.C. § 3313(c), covering "New onshore production wells."

[3] 15 U.S.C. § 3317(c)(5), covering gas that involved high cost production which the Commission found to present extraordinary risks or costs, and therefore provided higher ceiling prices.

STATUTORY BACKGROUND

In enacting the NGPA, "Congress comprehensively and dramatically changed the method of pricing natural gas produced in the United States." *Public Service Commission of State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 322 (1983). In order to effect this change, Congress in Title I of the NGPA established "an exhaustive categorization of natural gas production." *Id.* at 332. Under this categorization, Congress immediately deregulated gas in a number of categories,[4] provided for phased deregulation of gas in other categories,[5] and provided for permanent regulation of the remaining natural gas categories.[6] The issue in this case arises because some natural gas has qualified in two categories, one regulated and the other deregulated.

SUMMARY OF ARGUMENT

The only issue in this case involves the treatment of natural gas which is dually qualified under regulated and deregulated NGPA categories. In a rulemaking, Order No. 406, the Commission found that NGPA Section 121 required deregulation of such dually qualified natural gas. The Tenth Circuit, in contrast, found that NGPA Section 121 was ambiguous but that NGPA Section 101(b)(5) places in the hands of natural gas producers the right to choose whether their gas should be regulated or deregulated.

The Commission's interpretation was a reasonable one and, thus, should be accepted, particularly in view of the very substantial deference due Commission interpreta-

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[4] *See e.g.*, NGPA Sections 107(c)(1)-(4) (15 U.S.C. § 3317(c)(1)-(4)).

[5] *See e.g.*, NGPA Sections 102(c) (15 U.S.C. § 3312(c)) and 103 (15 U.S.C. § 3313).

[6] *See e.g.*, NGPA Sections 104 (15 U.S.C. § 3314), 107(c)(5) (15 U.S.C. § 3317(c)(5), and 108 (15 U.S.C. § 3318).

tions of the NGPA, a statute which it has been entrusted to administer. The Commission based its interpretation primarily on NGPA Section 121. The plain and unambiguous language of that provision mandates deregulation of the dually qualified gas at issue here. Indeed, any contrary interpretation, would by implication add an additional exception for dually qualified gas to the two expressly stated exceptions contained in Section 121. The Court has previously found similar exceptions by implication to be improper. The reasonableness of the Commission's interpretation of Section 121 is also supported by the underlying legislative history of the NGPA.

The Tenth Circuit reversed the Commission based primarily on its reading of NGPA Section 101(b)(5). The Tenth Circuit's interpretation of Section 101(b)(5), however, produces certain anomalous results which clearly show the unreasonableness of such an interpretation. Further, the Commission interpreted Section 101(b)(5) as being consistent with the deregulation of dually qualified natural gas. Since that interpretation was based on a reading of the statutory language in its ordinary, everyday sense, and that reading was a reasonable one, the Commission's interpretation of Section 101(b)(5), and not the Tenth Circuit's interpretation, should be accepted by the Court.

Finally, if this Court were to affirm the Tenth Circuit's decision, the resulting reversal of the Commission's rule should be on a prospective-only basis. Under the *Chevron Oil* standards, such prospective-only treatment is clearly warranted. Absent such prospective-only treatment, natural gas pipelines, their customers, and ultimate consumers will suffer very substantial harm.

ARGUMENT

I. THE TENTH CIRCUIT CLEARLY ERRED IN REVERSING THE COMMISSION'S FINDING THAT THE NGPA MANDATES DEREGULATION OF NATURAL GAS DUALLY QUALIFIED IN BOTH REGULATED AND DEREGULATED CATEGORIES

There can be no doubt that the Commission's interpretation of the NGPA is entitled to substantial deference. As the Court stated in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 844 (1984): "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." *Accord Aluminum Co. of America* v. *Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 385 (1984); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), *quoting Power Reactor Development Co.* v. *International Union of Electric, Radio and Machine Workers*, 367 U.S. 396, 408 (1961). Thus, the Commission's interpretation of the NGPA can only be overturned if " 'there are compelling indications that it is wrong.' " *E.I. duPont de Nemours and Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), *quoting Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

Further, in view of the very substantial deference due the Commission, this Court " 'need not find that [its] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' " *Aluminum Co. of America* v. *Central Lincoln People's Utility Dist.*, 467 U.S. at 389, *quoting American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 422-23 (1983) (insertion in original). The Court " 'need only conclude that it is *a* reasonable intepretation of the relevant provisions.' " *Id.* (emphasis in original).[7]

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[7] Deference to the Commission is particularly warranted in this case since much of the dually qualified natural gas qualifies as Sec-

Against this backdrop, the Commission's interpretation of the NGPA should be affirmed and the Tenth Circuit reversed. While perhaps not the only possible interpretation, the Commission's interpretation was nonetheless a reasonable one.

A. *The Commission Correctly Concluded That NGPA Section 121 Mandated Deregulation Of Natural Gas Dually Qualified In Both Regulated And Deregulated Categories*

In interpreting a statute, the "point of departure . . . is the language of the enactment," *Andrus* v. *Allard*, 444 U.S. 51, 56 (1979), with that language interpreted in its " 'ordinary, everyday sense[]'," *Malat* v. *Riddell*, 383 U.S. 569, 571 (1966), *quoting Crane* v. *Comm. of Internal Revenue*, 331 U.S. 1, 6 (1947). If, after analysis of the statute, the Court finds " 'the terms of a statute unambiguous, judicial inquiry is complete' " "unless exceptional circumstances dictate otherwise." *Burlington Northern R. Co.* v. *Oklahoma Tax Comm.*, 107 S.Ct. 1855, 1860 (1987), *quoting Rubin* v. *United States*, 449 U.S. 424, 430 (1981). Consistent with these precepts, the Commission analyzed the plain language of NGPA Section 121, interpreted in its ordinary, everyday meaning, and concluded that the unambiguous language of Section 121 mandated deregulation of natural gas dually qualified in both regulated and deregulated categories.

1. An analysis of the language of Section 121 shows the reasonableness of the Commission's interpretation. In particular, Section 121(a) provides in pertinent part that:

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tion 107(c)(5) gas. The Commission has very broad discretion over the price to be charged for that gas. *See Pennzoil Co.* v. *FERC*, 671 F.2d 119, 126 (5th Cir. 1982) ("[t]he authority delegated by Congress [with regard to NGPA Section 107(c)(5)] was broad indeed: responsibility for both the identification of gas to which such incentives should be extended and the determination of the appropriate maximum lawful incentive price . . . .").

Subject to the reimposition of price controls as provided in section 122 of this title, *the provisions of part A of this subchapter respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall*, except as provided in subsections (d) and (e) of this section, *cease to apply effective January 1, 1985:*

(1) *New natural gas.*—New natural gas (as defined in section 102(c) of this title.)

(2) *New, onshore productions wells.*—Natura gas produced from any new, onshore production well (as defined in section 103(c) of this title), if such natural gas—

(A) was not committed or dedicated to interstate commerce on April 20, 1977; and

(B) is produced from a completion location which is located at a depth of more than 5,000 feet.

* * * * *

(emphasis added). The "provisions of part A" refers to the ceiling prices set forth in Title I of the NGPA. The two noted exceptions refer to Alaska Natural Gas and indefinite price escalators. There is no provision exempting dually qualified gas to any extent whatsoever.

NGPA Section 121, thus, deregulates Section 102(c) and 103(c) natural gas, subject to very limited exceptions that have no pertinence to this case. This is significant because all of the natural gas at issue here qualified for pricing treatment under either Section 102(c) or 103(c). While this gas has also qualified for pricing under other regulated categories, since Congress did not create an exception to Section 121 for dually qualified gas, the dual qualification of that gas has no significance. Under Section 121, that gas is still deregulated.

Therefore, as the Commission found (App. at 75a-76a), the plain language of NGPA Section 121 provided

for the deregulation of the dually qualified gas at issue in this case. At the very least, an analysis of the language of Section 121 shows that the Commission had a reasonable basis for concluding that Section 121 mandated deregulation of this gas.

2. Indeed, any finding to the contrary would by implication add an additional exception to Section 121 for dually qualified gas. Because Section 121 already explicitly delineates two exceptions to the general deregulation mandate, "additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *See Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 616-17 (1980); *accord American Bank and Trust Co.* v. *Dallas County*, 463 U.S. 855, 864 (1983); *Andrus* v. *Allard*, 444 U.S. at 56.

3. Further, as also noted by the Commission (App. at 108a-109a), the underlying legislative history of the NGPA supports this interpretation of Section 121. Senator Bartlett, in a discussion of the conference report, stated:

> [I]n informal discussions on the floor it has been asserted that stripper[8] wells are deregulated. *This is true only to the extent that such wells are otherwise new wells and would be deregulated anyway.* Their character as stripper wells, as shown under Section 121, does not get them deregulated in any way.

Cong. Rec. S. 15997 (September 25, 1978), 124 Cong. Rec. 31387 (1987) (emphasis added).[9]

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[8] NGPA Section 108, 15 U.S.C. § 3318.

[9] The Tenth Circuit (App. at 22a) discounted this statement based on a statement in the Conference Report discussing NGPA Section 105 (15 U.S.C. 3315) that stripper gas would remain subject to Section 108 pricing rather than being deregulated "as an existing intrastate contract" under Section 105. That conference report statement has no pertinence to the instant case because it

Senator Bartlett's statement indicates that Congress intended for natural gas qualifying in both regulated and deregulated categories to be deregulated. Indeed, such a statement is not surprising given other Congressional indications that the NGPA was intended to result in market-based pricing for high-cost gas, a desire which can only be satisfied if Order No. 406 is affirmed.[10] *See e.g.*, *Transcontinental Gas Pipeline Co.* v. *State Oil and Gas Board*, 106 S.Ct. 709, 716-17 (1986) (in the NGPA, Congress determined "that the supply, the demand, and the price of high-cost gas [should] be determined by market forces").

Therefore, the Commission's conclusion that NGPA Section 121 mandated deregulation of dually qualified gas was a reasonable one. That conclusion which was derived from the statutory language and which is consistent with Congressional intent, is to be regarded as conclusive. *See American Bank and Trust Co.* v. *Dallas County*, 463 U.S. at 862, *quoting Consumer Product Safety Comm.* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

B. *The Tenth Circuit Improperly Relied On An Erroneous Interpretation Of Section 101(b)(5) In Reversing The Commission*

The primary basis for the Tenth Circuit's reversal was its conclusion that NGPA Section 101(b)(5) allowed

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pertained to intrastate gas under Section 105 sold under a contract containing an indefinite price escalation provision, rather than the deregulated categories at issue here which involve Section 102(c) and 103(c) gas. Indeed, in contrast to Sections 121(a)-(c), Section 121(d) maintains maximum lawful prices for intrastate gas sold under a contract containing an indefinite price escalation provision. Thus, the statement in the Conference Report is consistent with the statutory language.

[10] The regulated categories, *e.g.*, §§ 107(c)(5) and 108, associated with this dually qualified gas are high-cost categories with ceiling prices some two-three times above current market clearing prices.

producers of dually qualified gas to choose whether their gas would be regulated or deregulated. The Tenth Circuit's conclusion is legally flawed and cannot be sustained, since the Commission's interpretation of Section 101(b)(5) was clearly reasonable.

1. Section 101(b)(5) provides in pertinent part that:

> If any natural gas qualifies under more than one provision of this subchapter . . . ., the *provision which could result in the highest price shall be applicable.* (emphasis added)

The Commission focused on the plain language of this section and found that this provision was consistent with and supported the deregulation of dually qualified natural gas pursuant to Section 121. App. at 110a-111a.

The Commission's conclusion was certainly a reasonable one since the Commission focused on the language of the statute and interpreted that language based on its "ordinary, everyday" meaning. *See* p. 6, *supra*. In evaluating this statutory provision, the Commission focused on the word "could" and found that "[w]ithout question, a deregulated price *could* always result in a price higher than a regulated price which is subject to a ceiling price." App. at 111a (emphasis in original). There can be no doubt that this reading of Section 101(b)(5) is consistent with the plain words of that provision and, indeed, the Tenth Circuit has conceded this fact (App. at 15a). Thus, the Commission had a reasonable basis in concluding that Section 101(b)(5) supported deregulating natural gas which dually qualified in both regulated and deregulated categories.

2. Further, because the Tenth Circuit's interpretation of Section 101(b)(5) leads to some anomalous results, anomalies that are not present under the Commission's interpretation, the court's interpretation cannot be accepted. For example, the Tenth Circuit's interpretation establishes a price floor. App. at 23a. As this Court has

recognized, however, the NGPA established *ceiling* prices. *See Public Service Commission of New York* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 339. Nowhere in the NGPA, in fact, is there any mention of price floors. Similarly, the Tenth Circuit recognized that its interpretation of the statute would render renegotiation provisions in a large number of contracts meaningless. App. at 17a.

Lastly, the Tenth Circuit's decision would allow producers to choose to deregulate natural gas for a finite period of time and then to subsequently obtain regulation of the same gas. The NGPA expressly provided, however, for gas to be forever deregulated once it was deregulated except under certain very limited circumstances which are not present here. *See e.g.* NGPA Section 121(a). Indeed, the only NGPA provision which allows for price controls to be reimposed is Section 122 (15 U.S.C. § 3332). Such reimposition, however, can only occur by action of the President or Congress. Thus, the Tenth Circuit's interpretation greatly expands Section 122 by allowing natural gas producers, in addition to the President or Congress, to reinstitute price controls. Clearly, such an interpretation should not be allowed to stand.

II. IF THE COURT WERE TO AFFIRM THE TENTH CIRCUIT, THEN ORDER NO. 406 SHOULD BE REVERSED ON A PROSPECTIVE-ONLY BASIS

As detailed above, WNG strongly believes that the Tenth Circuit's interpretation of the NGPA was in error. If the Court, however, affirms the Tenth Circuit's interpretation, then the reversal of the Commission's Order No. 406 should be made effective on a prospective-only basis.[11] This is necessary to prevent gross inequity to natural gas pipelines and their customers.

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[11] By prospectively, we mean prospective from the date of any opinion of this Court.

In determining whether to apply a decision retroactively or prospectively, this Court considers three separate factors:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'

Chevron Oil Co. v. *Huson*, 404 U.S. 97, 106-107 (1971), omissions in original citations; *see also Northern Pipeline Const.* v. *Marathon Pipeline Co.*, 458 U.S. 50, 87-88 (1982) (effect of decision was to have a prospective-only application even though Court found statute unconstitutional).

In the instant case, the first *Chevron Oil* factor warrants nonretroactivity because this case involves an issue of first impression. Reversal of Order No. 406 also could not have been reasonably foreshadowed because the Commission's interpretation of the NGPA is supported by the plain language of the statute, as noted above. Given the substantial deference accorded such a Commission interpretation, parties had a reasonable basis in relying on Order No. 406. Indeed, reliance on Order No. 406 was particularly warranted because a number of natural gas producers, including at least one seeking reversal of Order No. 406 in this case, had previously interpreted

the NGPA in a manner consistent with Order No. 406. App. at 112a-113a.

The second and third *Chevron Oil* factors similarly justify nonretroactive treatment. Natural Gas producers, after all, have been collecting the lower deregulated price since January 1, 1985. Presumably producers have made investment decisions based on that lower price, since, as discussed above, many producers at one time believed that the Commission's interpretation was the correct one. Because investments in past periods have already been made and cannot be retroactively changed, a court order making the higher price effective retroactive would thus likely have no effect on investments by natural gas producers and would merely provide producers with a windfall.

In contrast, retroactive application of a decision affirming the Tenth Circuit would result in very substantial harm to natural gas pipelines and their customers. Natural gas pipelines would need to collect hundreds of millions of dollars for past gas purchases from their customers, that in turn, would collect these amounts from the ultimate consumer. These customers would be harmed not only by the collection of such large amounts for past purchases, but substantial intergenerational equity problems would exist in that many of the ultimate consumers would evade their fair share of the costs, with those costs borne, at least in part, by other consumers. *Cf. FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154-55 (1962) ("the transient nature of our society . . . often prevents refunds from reaching those to whom they are due").

It should be noted that recovery of these amounts by pipelines may, in fact, be difficult because of the current intense competition with alternate fuels, such as fuel oil and spot gas, being experienced by many natural gas pipelines. In these highly competitive times, minor in-

creases in gas costs can have a substantial detrimental effect on a pipeline's ability to sell gas. The very large increases which may be faced by some pipelines will surely have a disastrous effect on those companies' sales and may prevent such companies from recovering all of the retroactive amounts due natural gas producers if the Tenth Circuit is affirmed. Such a result would be contrary to long established principles of public utility ratemaking. *See State of Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission of Missouri*, 262 U.S. 276, 291 (1923) (Brandeis concurring) (the Constitution guarantees public utilities "the reasonable cost of conducting the business"); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business").

Further, many of the dollars at issue here involve tight formation natural gas [12] qualifying for an incentive price under NGPA Section 107(c)(5), as well as under a deregulated category. As noted on page 5 n.7, *supra*, special deference is owed the Commission with regard to such 107(c)(5) gas because Congress expressly delegated to the Commission the regulation of this high cost gas. *See* NGPA Section 107(b), 15 U.S.C. § 3317(b). While the Commission was given broad authority to regulate such high-cost gas, Congress only allowed the Commission to provide for an incentive price for 107(c)(5) gas to the extent "necessary to provide reasonable incentives for the production of such high cost natural gas." *Id.*

In discharging its duties with regard to this high cost gas, the Commission found that the incentive price was only "necessary" on an interim basis through January 1,

[12] The ceiling price for Section 107(c)(5) gas is currently in excess of $6.40 per MMBtu, or over three times the market clearing price.

1985.[13] And, as a means of eliminating the interim Section 107(c)(5) price for the post-January 1, 1985 period for much of the gas qualifying under that section, the Commission issued Order No. 406.

Thus, if Order No. 406 were ultimately reversed and applied retroactively, the Commission's efforts in carrying out its statutory responsibilities under Section 107 would be severely disrupted. Natural gas producers, after all, would be allowed to collect this extremely high interim price for some three years after the prices were to have been eliminated and during a time period when such prices were unnecessary. Prospective-only application of any affirmance of the Tenth Circuit's decision would avoid this inequitable and unlawful result.

[13] There is no doubt the Commission intended the tight formation price to be an interim price until deregulation as shown by the following discussion from the rulemaking which promulgated the tight formation incentive price:

> [T]he focus of our pricing inquiry is to determine the necessary incentive for the transition period between now and 1985. It is our intention to establish a price that will stimulate production of gas from tight formations during the transition period.

Order No. 99, FERC Stats. & Regs. [Reg. Preambles] Para. 30,183, p. 31,266 (1980).

CONCLUSION

For the foregoing reasons, the Federal Energy Regulatory Commission's Order No. 406 should be affirmed and the Tenth Circuit's action on Order No. 406 reversed. If the Court, however, were to affirm the Tenth Circuit, then the resulting reversal of Order No. 406 should occur on a prospective-only basis.

Respectfully submitted,

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